Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on	)	**CC Docket No. 96-45**
Universal Service	)	**DA 99-1356**

REPLY COMMENTS

OF THE

COALITION OF RURAL TELEPHONE COMPANIES

September 17, 1999

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SUMMARY

The Coalition of Rural Telephone Companies submits these Reply Comments with respect to the Petition seeking preemption of a South Dakota Public Utilities Commission ("SD PUC") Decision not to designate Western Wireless ("WW") as an Eligible Telecommunications Carrier ("ETC"). The comments filed in this proceeding do not change the inescapable conclusion: The SD PUC examined the facts, or more precisely, the lack of facts, and decided that WW did not demonstrate that it meets the statutory and regulatory criteria to be designated an Eligible Telecommunications Carrier. The WW case was based on vague promises; the SD PUC is justified in not relying on mere promises. Accordingly, a decision by a state commission not to accept important public interest universal service considerations on faith does not, and cannot, constitute an "impossible" standard that prevents any entity from providing telecommunications services. Neither WW nor any of its supporters provided any evidence, much less proof, that the *SD PUC Decision* creates a *per se* "barrier to entry." Therefore, the *SD PUC Decision* should not be disturbed.

In addition, as a matter of law, Congress assigned to the States the responsibility to determine ETC designations consistent with the public interest, convenience and necessity. If a carrier does not measure up to established requirements, the state commission is expected to reject an ETC request.

The controlling statute requires that a carrier "offer" the supported services as a condition of ETC designation; the statute does not say "will offer." This Commission's own interpretations support this unambiguous requirement. Moreover, the recent Fifth Circuit decision supports the conclusion that state commissions have the authority to establish their own reasonable criteria in ETC designation matters. The findings that the SD PUC applied are both reasonable and

consistent with the purpose of ETC designation: to serve the principles of Universal Service as codified in the Act. To the extent the requirements of the SD PUC may inhibit some competitors, they are nevertheless competitively neutral because these requirements are applicable to all carriers, and are otherwise within the scope of Section 253(b).

The Minnesota Department of Public Service proposes an approach to the examination of ETC designations which is procedurally more complex, but ultimately would require the same showings as those required by the *SD PUC Decision*.

The SD PUC is totally justified in requiring relevant service information from requesting carriers, such as pricing information, in evaluating the credibility of a carrier's request and claims. The lack of information and the refusal by WW to provide or explain important and directly relevant information concerning its request supports the SD PUC's decision that reliance on a carrier's stated intent is not sufficient to ensure that the public interest with respect to ETC designations would be served.

For these reasons, the Commission should reject and dismiss WW's preemption request. To the extent the Commission may conclude that there are legal errors in the *SD PUC Decision*, the matter should be returned to the South Dakota Commission for further proceedings.

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Federal State Board on	)	CC Docket No. 96-45
Universal Service	)	DA 99-1356

REPLY COMMENTS OF THE COALITION OF RURAL TELEPHONE COMPANIES

The Coalition of Rural Telephone Companies ("Coalition") respectfully submits its Reply Comments in response to the Comments filed in this proceeding.[1] The Coalition opposed the Petition of Western Wireless ("WW") for preemption of the South Dakota Public Utilities Commission ("SD PUC") on the grounds that the *SD PUC Decision*[2] denying Eligible Telecommunications Carrier ("ETC") status to WW was fully justified based on the law and the facts in the context of the record of the evidentiary hearing.

I. INTRODUCTION

This case is not about whether competition and universal service can co-exist, or whether competition will lower costs and improve service in rural areas, or whether the verb "offer" in the present tense should instead be interpreted in the future tense to satisfy some abstract notion of competitive neutrality. It is not a case of economic philosophy or promotion of alternative technology, or breaking the "stranglehold" of incumbent LECs. The case is about *facts*, or more

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[1] Unless otherwise indicated, all citations herein are to the comments filed by the various parties on September 2, 1999, in the docket captioned above.

[2] *Findings of Fact and Conclusions of Law: Notice of Entry of Order*, TC 98-146, In the Matter of the Filing by GCC Licence Corporation for Designation as an Eligible Telecommunications Carrier (May 19, 1999)("*SD PUC Decision*").

precisely, the lack of facts, produced by an applicant with the burden of proof at an evidentiary hearing. The law makes ETC status available to carriers who demonstrate that they meet the statutory and regulatory criteria. Instead of presenting a case based on facts, WW asked the SD PUC to accept its *bona fides* on faith, and now complains that if its case was not accepted on faith, it must be because the state adopted an impossible standard that no non-incumbent can meet.

WW now comes before this Commission and asks that it accept on faith what WW failed to prove to the Congressionally-designated finder of fact.[3] Neither WW nor any of its supporters presented a scintilla of evidence from the record before the SD PUC, or from any other source, which even suggests that the *SD PUC Decision* has the effect of preventing any entity from providing telecommunications service.

Beyond this factual threshold, the law is also clear: Congress assigned the SD PUC the task of determining, *consistent with the public interest, convenience and necessity*, whether an applying carrier meets the requirements to be designated an ETC.[4] This assignment necessarily implies that the SD PUC is not only entitled, but required, to reject an applicant that does not "prove up" its case.

A scenario could arguably be constructed in which a state commission ignores substantial evidence of record before it and creates an impossible burden for competitive ETCs. Such a

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[3] If the hearing had been before this Commission, WW would have faced the requirement that "both the burden of proceeding upon any issue specified by the Commission as well as the burden of proof upon all such issues, shall be upon the applicant. . . ." 47 C.F.R. 1.254. WW's petition makes many claims, but it "demonstrates" nothing much less the "economics of the telecommunications market place." WW at 4.

[4] Congress also provided the States with the authority to examine the public interest further with respect to whether a second ETC should be designated in an area served by a rural telephone company. The SD PUC did not reach this issue.

hypothetical violation of its duties would be subject to remedy by the courts,[5] or perhaps, *arguendo*, under a Section 253 preemption. However, there is nothing in this record upon which this Commission could conclude that the SD PUC so violated its duty. Rather, the SD PUC refused to designate WW as an ETC on the basis of "intent" and "commitment" because it found no evidence in the record upon which it could rely, and the assertions of WW's sole witness raised more questions than they answered. WW's supporters also have not bothered to produce any evidence not before the SD PUC; instead, they rely entirely on the apparent belief that if they repeat often enough that the SD PUC has made competition impossible, this Commission will conclude that the mantra itself must be true and dispositive.

If this Commission intends to claim the right to second-guess the factual or public interest conclusions of state commissions performing the duties assigned them by federal law, it should wait for a case in which the record evidence supports preemption. WW has conducted a major lobbying campaign at the Commission over the past year to convince the Commission that wireless service is the key to lowering the cost of serving rural areas, if only USF money can be made readily available.[6] Whether or not the Commission believes the lobbyists' claim in the

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[5] The SD PUC attached to its Comments a Notice of Appeal of its decision filed by WW with a South Dakota court raising the same issues WW has raised before this Commission. This appeal was noticed two days before the Petition was filed with this Commission, but was not mentioned in the Petition. At best, such a practice burdens state commissions such as the SD PUC and other interested parties with the expense of duplicate litigation.

[6] The Coalition questions how the promotion of wireless services with less advanced capability (*e.g.*, data transmission at 9.6 kilobytes per second), at the expense of investment in wireline broadband networks that hold the greatest promise of advanced services delivery, can be squared with the Commission's stated "strategy" for rural access to high-speed Internet services. *See* "News: FCC Chairman Kennard Meets With Senators; Maps Out Strategy For Rural Access To High-Speed Internet Services" released by the Commission on June 10, 1999. The Commission has recognized that encouragement of capital investment by telephone companies in facilities to service rural areas will lead to advanced telecommunications that foster the goal of rural economic development. However, the current flawed approach to so-called "portability" of

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abstract or in its rulemaking proceedings,[7] it is not free to consider such lobbying as a basis for countermanding the conclusions of the SD PUC reached upon sworn testimony subjected to cross-examination.

II. THE *SD PUC DECISION* IS CONSISTENT WITH THE STATUTE AND FCC PRECEDENT.

A. The Plain Meaning Of Section 214(e) Is That The Supported Services Be "Offered."

Section 214(e)(2) requires or authorizes state commissions to designate additional ETCs "so long as each additional requesting carrier meets the requirements of paragraph (1)." Paragraph (1), in turn, requires that the carrier "offer" the supported services. WW and its supporters argue that it need not offer the services until after it is designated and should only be expected to show "intent and commitment." The SD PUC's Comments point out that the statute is unambiguous and must be enforced by its terms.[8] The Rural Telephone Coalition ("RTC") points out that the statute refers to a carrier which "meets" the requirements.[9]

WW and its supporters argue that the statute cannot be interpreted to require a present

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[6](...continued)
high cost network support will discourage investment in broadband networks because as currently constructed, the "portability" rules will substantially dilute available network cost recovery in a manner which is counter productive to these stated goals. *See* Coalition Opposition at 35-42. On September 9, 1999, the Chairman also moderated and participated in the CEO Summit on Rural Telecommunications: Closing the Digital Divide sponsored by Senator Tom Daschle of South Dakota at which WW CEO John Stanton complained about the process of obtaining ETC designation. *See* Internet http://dpc.senate.gov.

[7] *See Notice of Proposed Rulemaking*, In the Matter of Extending Wireless Telecommunications Services to Tribal Lands, WT Docket No. 99-266, released August 18, 1999 at para. 9. Whatever data WW may have submitted in advance of this proceeding was not before the SD PUC, was not sworn or subjected to cross examination, and cannot be considered in any review of whether the *SD PUC Decision* was based on substantive evidence.

[8] SD PUC at 7. *See also* US West at 7-8.

[9] RTC at 3.

offering of service, because it is impossible to offer service unless ETC designation is received.[10] Because no evidence, let alone proof, of this impossibility claim is presented by any party, the Commission has no basis upon which to conclude the statute must be interpreted differently in order to achieve its objectives.

B. The Commission's Interpretations Of The Statute Are Consistent With A Present Requirement To Offer The Supported Services.

The Commission has consistently considered the requirement to "offer" service in the present tense. For example, the day after comments were filed in this proceeding, the Commission released a rulemaking in which it explained that Section 214(e) requires that "[t]o be designated as an eligible telecommunications carrier, a carrier must: (A) offer the services that are supported . . . ."[11] The Coalition's Opposition noted that the WW Petition misstated the Commission's limited holding in the *Fort Mojave* order.[12] AT&T continues this misstatement by arguing that the Commission ruled that designation comes first and then the obligation to provide the supported services arises later.[13] The four carriers designated ETCs in that order each submitted sworn statements that they *currently* offered the supported services, with the exception of San Carlos which requested and was granted an extension of time to offer toll limitation

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[10] WW at 3-4; ALTS at 4 and 5; AT&T at 7 ("nearly impossible"), at 8 ("virtually impossible"); CTIA at 6; PCIA at 4. ALTS' invocation of Joseph Heller, while commendable as a matter of pleading style, is only valid if impossibility exists. Since impossibility was neither proven nor is self-evident, there is no *Catch 22*.

[11] Further Notice of Proposed Rulemaking, In the Matter of Federal-State Joint Board on Universal Service: Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, CC Docket No. 96-45, FCC 99-204, released September 3, 1999 at para. 73.

[12] Coalition Opposition at 21-22.

[13] AT&T at 5.

pursuant to Section 54.101(c) of the Commission's Rules.[14] WW did not request a time extension under this section from the SD PUC, but even if it had, it could not have established that it was "otherwise eligible." In any event, time extensions are only available to provide single party service, E-911 or toll limitation.[15]

C. The Decision Of The Fifth Circuit Supports The *SD PUC Decision*.

The SD PUC Comments correctly point to the 5th Circuit's Decision in *Texas Office of Public Utility Counsel et al. v. Federal Communications Commission*, as additional authority for its decision.[16] Given that the SD PUC had authority to establish its own criteria, its decision that an ETC applicant should demonstrate the financial feasibility of its plan is a criterion well within the confines of its authority under Section 214(e)(2). This standard falls well short of a requirement that is demonstrably "so onerous that no otherwise eligible carrier could receive designation."[17] The fact that WW "had no demonstrable idea as to how it financially would provide a fixed wireless service . . ."[18] is relevant both to the narrow (although dispositive) issue of financial feasibility as well as the broad issue of the credibility of its entire proposal.

WW, however, interprets the 5th Circuit decision as deciding that the statute does not prohibit additional criteria without deciding whether the FCC has authority to bar such criteria. While it is true that the court did not reach the state appellants' claims that the Commission's

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[14] *Designation of Fort Majave Telecommunications, Inc., et al., as Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act*, 13 FCC Rcd 4547, 4551-3 (1998).

[15] 47 C.F.R. 54.101(c).

[16] SD PUC at 13.

[17] *Texas Office of Pub. Util. Counsel v. FCC*, 1999 WL 556461 (5th Cir. 1999). The *holding* of the Court was that "the agency erred in prohibiting the states from imposing additional eligibility requirements. . . ." The *dicta* in note 31 is just that.

[18] SD PUC at 13.

order also violated Section 152(b), there was no implication that the Commission might reinstate its prohibition on states applying additional criteria based on some other source of authority. The court unambiguously found the prohibition to be in error and reversed it.

CTIA attempts to finesse the 5th Circuit decision by inventing a "tension" between additional state requirements and the Commission's licensing scheme for wireless carriers.[19] Whether or not a wireless carrier is in compliance with the build out requirements of its license has no relevance to whether it has a credible financial plan to provide fixed wireless service throughout the Section 214(e) "service area" for which *it applied*.

D. To The Extent Section 253(a) Is Applicable, The *SD PUC Decision* Meets The Exception Criteria Of Section 253(b).

The supporters of WW all assume, without discussion, that the *SD PUC Decision* is a statute, regulation or other legal requirement within the context of Section 253(a).[20] The Coalition's Opposition, however, pointed out that it is not clear that a decision on an individual application, finding that the applicant has not met its burden of proof, was ever intended to be evaluated by this Commission under section 253(d).[21] AT&T states that the test under Section 253(a) is whether the *SD PUC Decision* "materially" inhibits the ability of new entrants to compete.[22] Since WW presented no evidence beyond its own claims to the SD PUC or in its Petition, this Commission can reach no conclusions on materiality.

ALTS argues that the *SD PUC Decision* is not saved by Section 253(b) because it serves

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[19] CTIA at 5.

[20] AT&T also argues that the decision should be preempted under the supremacy clause because it is allegedly inconsistent with Sections 214(e) and 254. AT&T at 3. The SD PUC, however, points out that such preemption is limited to outright or actual conflict. SD PUC at 8.

[21] Coalition Opposition at 12-13.

[22] AT&T at 7.

the interests of the ILECs.[23] PCIA claims the *SD PUC Decision* is not competitively neutral because the SD PUC's concern with "gaps" in WW's coverage was not applied to ILEC ETC requests.[24] Whatever competitive neutrality means, it cannot be achieved if WW's arguments are accepted. It is true that ILECs must occasionally extend lines, but that fact does not equate the current offer to serve of an existing carrier which meets the ETC requirements with a carrier which refuses to offer its service. With the former, the PUC can observe both current behavior and legal obligation to extend service regardless of ETC status. With WW, the PUC had only statements of "intent and commitment" and a strange reluctance to demonstrate a viable business plan. The two classes of carriers are not similarly situated, thus competitive neutrality is not violated when both are required to prove their eligibility for ETC status in a manner consistent with the reality of their situations.

III THE *SD PUC DECISION* IS JUSTIFIED BY THE RECORD.

A. There Was No Evidence, Much Less Proof, That The Decision Creates An Impossible Standard.

Western Wireless and its supporters repeat endlessly the claim that the SD PUC has created a barrier to entry for WW and potentially other carriers because service cannot be provided without receipt of USF.[25] WW provided no support whatsoever for this claim at the hearing, except its own assertion. Before this Commission, WW and its supporters have cited no evidence, much less proof of this claim. It provided, for example, neither cost estimates nor revenue forecasts to support its contention that it could not equal the incumbent's prices without

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[23] ALTS at 5.

[24] PCIA at 5. AT&T also claims (at 8) that the *SD PUC Decision* gives incumbents an "insurmountable" advantage, but offers no data whatever to support this claim.

[25] WW at 4; ALTS at 3, 4, and n. 4; AT&T at 6 and 7; CTIA at 2; PCIA at 4; RCC at 2; and US Cellular at 5.

USF and also that it could not determine its price unless it knew how much USF it would receive.[26] Each of its supporters have similarly failed to supply evidence from the South Dakota record, or anywhere else, to support the claim of impossibility.[27]

In the absence of an applicant providing evidence to support its claim, a state commission is entitled to suspect either that the applicant is not competent to operate a business because it has not completed a proper business plan or that a business plan was completed but is not being revealed because it would reflect unfavorably on the applicant's claims. A business plan might show either that the costs of service are not high and that the USF will be a total windfall, or that even with the USF, the applicant cannot afford to provide the service on a universal basis and so is unlikely to actually extend service to the most expensive areas, but merely "cream-skim" the low cost areas.

The Comments of the SD PUC correctly reflect the record: WW had no firm plans for the type of service to be offered, or how it was going to get service to the public; it did not have a financial or pricing plan, and it neither offered or proved that it was able to offer services designated for universal service support.[28] Thus, "if a common carrier does not know how much it is going to charge for its service, it is submitted that it cannot realistically have a sound plan for financing that service."[29]

In the absence of any data, record or otherwise, AT&T attempts to fabricate an argument

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[26] Coalition Opposition at 14-15 and 24-27.

[27] The Coalition does not suggest that evidence external to the South Dakota record could be considered by this Commission in evaluating whether the PUC's decision was based on substantial evidence. Regardless, the lack of even the assertion of the existence of such external evidence is telling.

[28] SD PUC at 10-12.

[29] *Id.* at 13.

that the *SD PUC Decision* would require competing carriers to engage in economically irrational behavior. Under AT&T's scenario, a carrier will have to commit the capital and resources to build facilities with no guarantee that ETC status will be granted, then it must price its service to recover its cost which "will certainly be higher than the subsidized price charged by the incumbent" or offer its service at a loss.[30]

Consider each of the elements of AT&T's scenario. First of all, the *SD PUC Decision* was in response to the application of WW alone, not of any other carrier. The SD PUC's conclusion that service must be offered before ETC status is granted was made in the context of a carrier whose application was strikingly devoid of specifics which would lend credence to its claims of good intentions and commitment. Secondly, to the extent its conclusion that an applicant must actually offer service could be interpreted as applicable to future applications, the SD PUC carefully explained an alternative holding:

> Even if the [SD PUC] could grant a company ETC status based on intentions to serve, the Commission finds that [WW] has failed to show that its proposed fixed wireless system could be offered to customers throughout South Dakota immediately upon being granted ETC status.[31]

This finding, therefore, is particular to the failures of WW to "prove up" its case and could well be different for another carrier's application, or even a revised WW application, which actually presented a credible case.

AT&T's concern with commitment of capital and resources must be put in the context of an applicant which claimed that it would provide the supported services using the existing cellular mobile infrastructure. The only additional expense was claimed to be the customer premises

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[30] AT&T at 6.

[31] *SD PUC Decision*, Finding of Fact at para. 22.

equipment at subscriber's residences.[32] Since this investment would only be incurred when a particular subscriber ordered service, the concern with putting investment at regulatory risk should be minimal. If, on the other hand, substantial additions will be needed to the infrastructure to handle the traffic of flat-rated residential and business service with different holding times, calling patterns and busy hour loads, then WW's testimony to the SD PUC that the existence of its mobile service proved its capability to offer fixed service was not correct.

WW cannot have it both ways: On one hand it argues there is a minimal incremental investment required which means it has little risk if it does not receive ETC designation, and little or no need for USF in any event because the "universal service offering" will be provisioned by sharing an investment which is already being paid for by another service. On the other hand, if it is true as WW and its supporters argue that provision of universal service is so expensive that it cannot be provided without USF, then the existence of its mobile network does not prove its capability to provide the universal service, contrary to its testimony.

There is nothing in the record to support AT&T's claim that a competing carrier's costs "will certainly be higher than the subsidized price charged by the incumbent."[33] Besides the total absence of any quantitative data or other competent evidence on this question, the price charged by an ILEC for local service is not necessarily comparable to that of a wireless carrier which employs a service area much larger than an ILECs local calling area. Thus, any price comparison made by a customer will include both local service and toll charges within the competing carrier's local area. AT&T has vigorously promoted forward looking cost models over the last several years on the presumption that a new entrant's costs will be lower than an incumbent, but now

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[32] WW also acknowledged that some additional towers might be needed, but declined to project their cost. *Id.*, Finding of Fact at para. 9.

[33] AT&T at 6.

seems to think incumbents can underprice new entrants. One of these positions must be erroneous.

B. The Minnesota Department Of Public Service Proposal Also Recognizes The Need For States To Require ETC Applicants To Demonstrate Their Ability To Provide Universal Service.

The Minnesota Department of Public Service ("MNDPS"), apparently supporting WW, recommends that this Commission adopt a five-step "checkpoint" procedure it has proposed in Minnesota which it calls the "Road to Universal Service."[34] While the Coalition does not agree with MNDPS' analysis of Section 214(e), its first checkpoint, ETC designation, nevertheless would require a carrier to demonstrate its ability to provide the nine supported services "(including a minimum level of local usage at a reasonable price that the Commission deems appropriate.)"[35]

Even if this test were applied to the South Dakota record, WW would not have passed since the SD PUC found as fact that "it is impossible to determine whether [WW] will meet ETC requirements when it actually begins to provide a universal service offering through a fixed wireless service."[36] Nor could the SD PUC have determined that the service would be offered at a reasonable price because the applicant claimed it could not determine the price until after it was designated.[37] "GCC's statements on pricing demonstrate the lack of a clear, financial plan to

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[34] MNDPS at 2, and attached Initial Brief in Minnesota Public Utilities Commission Docket No. P5695/M-98-1285 ("Initial Brief").

[35] MNDPS Initial Brief at 20.

[36] *SD PUC Decision* Finding of Fact at para. 19. The SD PUC determined that it could not look to WW's mobile cellular service to determine ETC status because that service was not sufficiently comparable to the proposed fixed wireless service. *Id.*, Finding of Fact at paras. 8 and 11.

[37] This argument is disingenuous at best because the amount of USF available is a matter of (continued...)

provision fixed wireless service throughout the state."[38] Because WW would not have met the Checkpoint One test of the MNDPS, it is not clear how the MNDPS recommendation is relevant to this preemption proceeding.[39]

Assuming, *arguendo*, that WW's South Dakota application were deemed sufficient to pass Checkpoint One, it is significant that the MNDPS would require WW to address the very same concerns that the SD PUC has with the lack of specifics by conducting a post designation proceeding *prior to allowing WW to offer the service or apply to USAC*. Specifically, Checkpoint Two of the MNDPS proposal would require that, following designation as an ETC, a carrier would be required to make a "compliance filing" explaining its offering in detail and showing that the rates, terms and conditions of its offering comply with the ETC criteria and any state requirements regarding service quality and affordability, disconnects, billing dispute and customer complaint procedures. This filing would be subject to public comment and possible revision in order to obtain Commission approval.[40]

In essence, the MNDPS proposal amounts to a bifurcated ETC approval process. While the Coalition does not agree that this is a correct reading of the law, the essential point in this proceeding is that MNDPS' support of WW is, in effect, conditioned on WW proving, as a condition subsequent to ETC designation, the same elements that WW failed to prove in South Dakota. Thus, the substantive concerns are quite similar, if not identical. The major difference is

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[37](...continued)
public record, as explained in the Coalition's Opposition and below.

[38] *Id.*, Finding of Fact at para. 24. The SD PUC found that WW's current cellular service does not offer an amount of free local usage. *Id.*, Finding of Fact at para.12.

[39] It appears that WW also has not put information regarding its proposed prices on the record in Minnesota.

[40] *Id.* at 20-21.

procedural in that the MNDPS proposal would be much more expensive and time-consuming than the single proceeding envisioned by the statute. For this reason, even if a state could proceed in this manner, this Commission should not promote this approach or require the additional expense. Although neighbors, South Dakota and Minnesota are very different states with substantially different resources to conduct multiple proceedings on the same issue. The two states are of comparable size, but Minnesota has more than six times the population.[41]

C. The SD PUC Reasonably Demanded Pricing Information In Order To Evaluate The Credibility Of WW's Proposal.

AT&T asserts that the SD PUC unreasonably required WW to disclose pricing information before "it knows what subsidies it may receive."[42] The Coalition's Opposition explained why this argument is without merit and lacking in candor.[43] In essence, the per line amount of support is publicly available for any study area, and does not change with designation of a second ETC, since it is based entirely on the costs of the incumbent LECs. If an applicant is unable to say that with USF my price will be $X, and without USF, the price will be $Y, then a state commission is entirely justified in concluding that the applicant lacks a financial plan for doing business and therefore may be unable to provide the service, no matter how sincere its

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[41] Rand McNally Commercial Atlas, 1993.

[42] AT&T at 9. The USF support is correctly termed a "subsidy" in the context of payments to a second ETC based solely on the study area average per line amount of support received by the incumbent. Thus the second ETC receives support based on the incumbent's costs which may be relevant to the second ETC's costs. AT&T also claims, in a footnote, that requirement of pricing information is regulation of rates in violation of Section 332(c)(3), but does not pursue this argument. The SD PUC very carefully explained that the relevance of the pricing information was not to regulate the rates, but to evaluate whether the proposal was financially feasible. *SD PUC Decision*, Findings of Fact at para. 24.

[43] Coalition Opposition at 26.

intentions.[44]

The alternate, and more probable, explanation is that WW very well knows what its costs are and support would be, but chose to withhold that information for its own reasons. In its application to this Commission for ETC designation on the Crow Reservation in Montana, WW has set forth a specific set of waiver requests of the universal service rules which it argues are necessary to provide service there. These waiver requests necessarily imply that WW is fully capable of computing its potential support and the effect on its rate level.[45]

Of course the amount of support to be received in the future is unknown, as the Commission has scheduled changes in 2000 for US West and in 2001 or later for the remaining ILECs in the state. While the uncertainty no doubt makes planning difficult for competitive ETCs, as described by US Cellular,[46] incumbent LECs face exactly the same difficulties. In order to maintain their existing universal services as well as meet their subscribers' demands for continual expansion and improvement of service, ILECs must be constantly investing in new plant and facilities, with no real certainty as to what their interstate revenue streams will be during the economic life of those investments, either access or USF.[47] Given this uncertainty, there is still

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[44] SD PUC at 13.

[45] Petition for ETC Designation and Related Waivers, Western Wireless Corporation, August 4, 1999. *See* Public Notice, Western Wireless Corporation Petitions for Designation as an Eligible Telecommunications Carrier and for Related Waivers to Provide Services Eligible for Universal Service Support to Crow Reservation, Montana, DA 99-1847, September 10, 1999.

[46] US Cellular at 7-12.

[47] The incumbent LECs with substantial network investment, as well as continuing requirements to add to that investment, face the additional uncertainty created by the ill-conceived "portability" rules which provide incentives to cream-skim and disincentives to invest in network for which the risk of recovery is greatly heightened. *See also* n. 5, *supra*. The Commission now appears to have recognized the potential chilling effects on investment incentives in its decision this week not to impose network element unbundling requirements for packet switching and

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no reason that WW could not have qualified any data filed with the SD PUC as being based upon current, known support levels.

IV. CONCLUSION

This Commission may believe that Universal Service can be both improved and made less expensive by encouraging competitive carriers, particularly those using wireless technology, to offer service in rural and high cost areas. The conclusion of the South Dakota Public Utilities Commission that one of the most outspoken wireless carriers failed to prove that it should be designated as an Eligible Telecommunications Carrier does not constitute a challenge to these beliefs. Rather, WW's failure to make its case leaves the questions unresolved.

The South Dakota decision stands for the proposition that regulatory agencies are required to make such decisions on the basis of facts, not faith, and that it is the obligation of the applicant to place the relevant facts on the record. Section 253 of the Communications Act was never intended to provide a vehicle for this Commission to conduct a *de novo* review of factual determinations made upon sworn testimony subjected to cross examination.

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[47](...continued)
digital subscriber line facilities. *See* "FCC Promotes Local Telephone Competition," News Report No. CC 99-41 released September 15, 1999. The dilution and diversion of limited high cost network support under a non-cost based "portability" approach present greater chilling effects on incentives to invest in rural area networks capable of providing advanced services than do the potential unbundling requirements. Therefore, for similar reasons, the Commission must reexamine its universal service rules which would provide support without relation to network cost. *See* Coalition Opposition at 35-42.

For these reasons, the Petition for Preemption should be dismissed. To the extent this Commission disagrees with any legal analysis of the South Dakota Commission, it should return the case to that Commission for further proceedings.

Finally, this Commission should also recognize that cases of this sort will continue and multiply until it acts to complete its universal service rules and to revise those rules which are counter-productive to both competition and universal service.

Respectfully submitted,

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September 17, 1999

CERTIFICATE OF SERVICE

I, Shelley Davis, of Kraskin, Lesse & Cosson, LLP, 2120 L Street, NW, Suite 520, Washington, DC 20037, hereby certify that a copy of the foregoing "Reply Comments of the Coalition of Rural Telephone Companies", was served this 17th day of September, 1999, by first class, U.S. Mail, postage prepaid to the following parties:

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